

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0168-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CHRISTOPHER SCOTT KILGORE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2010144679001DT

Honorable Michael W. Kemp, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch

Phoenix
Attorneys for Respondent

Christopher Kilgore

Safford
In Propria Persona

BRAMMER, Judge.

¶1 Petitioner Christopher Kilgore seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Kilgore has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Kilgore was convicted of theft of a means of transportation. On January 18, 2011, the trial court sentenced him to an enhanced, aggravated term of eight years’ imprisonment. Thereafter, in June 2011, Kilgore filed a petition for post-conviction relief. He argued both that newly discovered material facts required the court to vacate his sentence and his sentence had not been imposed in compliance with the rule set forth in *Blakely v. Washington*, 542 U.S. 296 (2004). The court correctly concluded that because Kilgore had not filed his petition timely he could not raise his sentencing claim, *see* Ariz. R. Crim. P. 32.4, and that his claim of newly discovered evidence failed because he had “fail[ed] to support th[e] claim” with affidavits, records, or other evidence as required by Rule 32.5.

¶3 On review, Kilgore first asserts he is entitled to relief pursuant to Rule 32.1(f), because “in most instances it takes 90 to 120 days to procure copies of the reporter[’]s transcript.” Kilgore did not raise this claim below and we therefore do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider for first time on review issues not presented to, or ruled on by, trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall

contain “[t]he issues which were decided by the trial court and which the defendant wishes to present” for review).

¶4 Kilgore also asserts that, contrary to the trial court’s conclusion, he met the standard for newly discovered evidence because *Blakely*, on which he now relies, was decided before his sentencing. But, a legal decision is not a fact within the meaning of Rule 32.1(e), nor has Kilgore explained how he exercised due diligence either in relation to *Blakely* or in relation to his sentence, which he also suggests is newly discovered evidence. *See* Ariz. R. Crim. P. 32.1(e), 32.9(c)(1). Kilgore further asserts *Blakely* constituted a significant change in the law under Rule 32.1(g) and he is entitled to relief on that basis. We do not address this claim because Kilgore did not raise it below. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928. We likewise do not address Kilgore’s new, unsupported claim that his sentence violated his right against double jeopardy. *See id.*; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii), (iv); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶5 Furthermore, Rule 32.2(b) requires that when a claim pursuant to Rule 32.1(d), (e), (f), (g), or (h) is raised in an untimely post-conviction relief proceeding, “the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” Kilgore did not comply with this requirement below and the trial court could have summarily dismissed the proceeding solely on that basis. *See* Ariz. R. Crim. P. 32.2(b). And, in any event, Kilgore agreed in his plea agreement to “judicial fact finding by preponderance of the evidence as to any aspect or enhancement of sentence, including

aggravating circumstances.” For all these reasons, although we grant the petition for review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge